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June 13, 2018

VIA DELAFILE

Karen J. Nickerson
Secretary
Delaware Public Service Commission

Re: In the Matter of the Application of Delmarva Power & Light Company for
an Increase in Electric Base Rates and Miscellaneous Tariff Changes
(Filed August 17, 2017), P.S.C. Docket No. 17-0977

Dear Ms. Nickerson:

In connection with the above referenced docket, enclosed, please find Delmarva Power & Light Company's Reply In Support Of Its Motion *In Limine* To Strike The Testimony Of Larry Blank Addressing The Allocation Of Costs Between Transmission And Distribution Functions And The Revised Prefiled Testimony Of Larry Blank Filed June 8, 2018.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

/s/ R. Judson Scaggs, Jr.

R. Judson Scaggs, Jr. (#2676)

RJS/mch

cc: Senior Hearing Examiner Lawrence.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF)
DELMARVA POWER & LIGHT COMPANY FOR)
AN INCREASE IN ELECTRIC BASE RATES AND) PSC Docket No. 17-0977
MISCELLANEOUS TARIFF CHANGES)
(Filed August 17, 2017))

**DELMARVA POWER & LIGHT COMPANY'S
REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* TO STRIKE THE
TESTIMONY OF LARRY BLANK ADDRESSING THE ALLOCATION OF COSTS
BETWEEN TRANSMISSION AND DISTRIBUTION FUNCTIONS AND THE
REVISED PREFILED TESTIMONY OF LARRY BLANK FILED JUNE 8, 2018**

Delmarva Power & Light Company ("Delmarva"), by and through its undersigned counsel, hereby submits this reply in response to the Delaware Public Service Commission Staff's ("Staff") letter of June 8, 2018 attaching Revised Prefiled Direct Testimony of Larry Blank and in further support of Delmarva's Motion *In Limine* To Strike the Testimony of Larry Blank Addressing the Allocation of Costs Between Transmission and Distribution Functions (the "Motion").

BACKGROUND

By its Motion, Delmarva seeks to strike those portions of the testimony of Witness Blank relating to Staff's proposal to reallocate costs between distribution and transmission functions because the Delaware Commission¹ lacks the ability to reallocate those costs due to federal preemption and the filed-rate doctrine. In apparent recognition of the validity of Delmarva's motion, on June 8, 2018, Staff filed Revised Prefiled Testimony of Larry Blank, together with a letter unilaterally declaring Delmarva's Motion moot. Regrettably,

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

however, Delmarva's motion is not moot. Neither Staff's June 8th Letter, nor Witness Blank's Revised Testimony explain whether Staff is withdrawing its functional reallocation argument and, therefore, increasing its proposed revenue requirement by \$14,092,000, nor has the testimony been revised to omit those portions that the Motion seeks to remove. In addition, in his revised testimony, Witness Blank inappropriately includes additional argument to bolster Staff's jurisdictional allocation claim (*i.e.*, that additional Delaware distribution costs should be reallocated to Maryland distribution customers) and interjects a completely new argument and proposal – that a regulatory liability should be created to track any amounts paid in distribution rates that might, at some future point, be reallocated to transmission rates. Having failed to include these arguments in the testimony filed in accordance with the procedural schedule established in this proceeding, Witness Blank's revised testimony should be declared inadmissible, and Delmarva's Motion seeking to strike those portions of his original testimony proposing to reallocate costs between distribution and transmission functions granted.

ARGUMENT

A. Delmarva's Motion Should Be Granted, And The Portions Of Witness Blank's Testimony Addressing The Reallocation Of Costs Between Distribution And Transmission Functions Stricken.

Apparently conceding that, due to federal preemption and the filed-rate case doctrine, the Delaware Commission lacks authority to approve his proposed methodology for reallocating costs between distribution and transmission functions, Witness Blank proposes to revise his testimony to "recommend the Delaware Public Service Commission order its Staff to investigate and pursue possible changes in the Company's transmission formula rate before the Federal Energy Regulatory Commission." *See*, Revised Prefiled Testimony of Larry Bank dated June 8, 2018 ("Blank Revised Testimony"), p. 14 (lines 14-17). Staff, through Witness Blank, continues to advance all of the same arguments made in support of the proposal that it now

acknowledges can only be considered by FERC – without any explanation as to how the testimony could impact any rate to be set by, or is relevant to any issue before, the Delaware Commission in this proceeding. Staff does not even bother to respond at all to the arguments advanced in the Motion as to why Blank’s functional allocation argument is inappropriate in this case.

It is well established that relevant evidence is admissible, while evidence that is not relevant is not. D.R.E. 402.² Relevant evidence means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” D.R.E. 402. Having conceded that changes to the Company’s transmission formula rate must be pursued – if at all – before FERC, Staff should be precluded from presenting evidence relating to its alternative methodology in this proceeding, as it is not relevant to any issue that can be decided by the Commission.³

² Although not technically bound by the Rules of Evidence, “[t]he Commission may consider the Delaware Rules of Evidence as a guide.” 26 *Del. Admin. Code* § 1001-2.13.1. More fundamentally, common sense and basic logic also dictate that the parties, the Hearing Examiner and the Delaware Commission should not expend valuable time and resources at a hearing and in briefing on an issue that the Delaware Commission lacks authority to decide.

³ Witness Blank’s suggestion that Staff should consider taking action in a different proceeding before a different Commission, is more appropriately addressed in a memorandum to Staff and is not an appropriate subject for his prefiled testimony in a state ratemaking proceeding.

B. Witness Blank's Belated Attempt To Insert Additional Argument And Increase The Amount Reallocated From Delaware Distribution To Maryland Distribution Is Inappropriate And Prejudicial To Delmarva.

In connection with his proposed revised testimony, Witness Blank proposes to add the following significant new testimony to bolster his claim that the Commission should reallocate millions of dollars of distribution costs from Delaware distribution to Maryland distribution:

A proxy for direct labor is required by the fact that the Company does not have direct labor values that are Maryland and Delaware specific. In this regard, the O&M expenses in Delaware must be adjusted for allocation ratio purposes only to conform to the Maryland treatment of storm damage costs. (Blank Revised Testimony page 4, lines 9-12).

* * * *

I recommend the Commission accept my changes in the labor allocation method employed by the Company for the jurisdictional split of general and common costs between Maryland and Delaware by rejecting DPL's use of gross plant and adopting operation and maintenance ("O&M") expense as a far more appropriate proxy for direct labor. A proxy for direct labor is required by the fact that the Company does not have direct labor values that are Maryland and Delaware specific. In this regard, the O&M expenses in Delaware must be adjusted for allocation ratio purposes only to conform to the Maryland treatment of storm damage costs. (Blank Revised Testimony, page 19, lines 12-19).

Additionally, and without any notification or explanation for the basis of the change, in his revised schedules provided to Delmarva on June 11, 2018, Witness Blank adds an additional \$3 million in costs that he seeks to reallocate from Delaware distribution to Maryland distribution. The impact of these newly proposed revisions, buried within Witness Blank's proposed revised schedules, would reduce Delmarva's revenue by approximately an additional

\$1.2 million.⁴ As demonstrated below, Staff's eleventh-hour amendment to Witness Blank's testimony to add new arguments is both procedurally and substantively improper and should not be permitted.

The Commission is empowered by its own regulations to "limit the number of witnesses or restrict evidence or its examination in the interest of justice and economy." 26 *Del. Admin. Code* § 1001-2.14.3. Further, parties are entitled to the timely identification of experts and the "substance of their expected opinion." *Turner v. Del. Surgical Grp., P.A.*, 67 A.3d 426, 429 (Del. 2013). This is so the opposing party has a "fair opportunity to meet that expert opinion..." for "[w]ithout the timely identification of the substance of an expert's expected opinion, the opposing party is unable to "prepare an effective cross-examination," to "prepare her own expert witness effectively" and "to take additional discovery..." *Id.* at 432. The obvious point of this rule is to avoid "trial by ambush." *Digiacobbe v. Sestak*, 1998 WL 684149, at *6 (Del. Ch. July 7, 1998).

To allow Witness Blank to file revised testimony advancing new and different arguments on issues unrelated to Delmarva's Motion would be patently unfair and unduly prejudicial to Delmarva. Having failed to raise these arguments in his testimony filed in accordance with the procedural schedule entered in this docket, and with less than two weeks before the start of the evidentiary hearing, Delmarva has no opportunity to conduct discovery into or to rebut this new testimony. To allow Staff to file revised testimony of Witness Blank

⁴ Compared to his original schedules, Witness Blank's revised Exhibit 2A seeks to increase the reduction in rate base attributable to reallocating distribution costs to Maryland by \$2,026,142. Witness Blank's revised Exhibit 3A seeks to increase the reduction in O&M costs attributable to reallocating distribution costs to Maryland by \$1,062,279. These proposed revisions, buried within Witness Blank's proposed revised schedules, would reduce Delmarva's revenue by approximately an additional \$1.2 million.

under the guise of responding to the wholly unrelated issues raised by Delmarva's Motion without a full and fair opportunity for Delmarva to respond would violate Delmarva's right to due process.

C. Witness Blank's Attempt To Add An Entirely New "Regulatory Liability" Argument To The Revised Testimony At This Late Stage Prejudicial To Delmarva And Unripe.

By the same token, Witness Blank's newly-minted argument urging the Delaware Commission to consider the "*creation of a regulatory liability account for DPL to account for these amounts collected from DPL retail customers for disposition at a later time once the FERC jurisdictional remedies are pursued*" (Blank Revised Testimony, page 18, lines 2-5) should not be countenanced. Not only does this argument come too late, and without a fair opportunity for Delmarva to respond, but Staff's belated request for a regulatory liability is not ripe for hearing in this docket.

A regulatory asset is created to prevent a utility from improperly recovering from customers when either: (a) a cost the utility is recovering through current rates ceases or decreases or (b) the utility starts recovering the cost from another source. An example of a "type (a)" regulatory asset is the regulatory asset established in February 2018 for the Federal Tax Cuts and Jobs Act – a regulatory asset supported by Delmarva. Delmarva's tax rate decreased, so its tax expense decreased, while it is recovering tax expenses based on the higher tax rate from customers in its current rates (that were set prior to the tax rate decrease). A regulatory asset to cover reallocated transmission costs, like the one proposed by Witness Blank, would be "type (b)," to prevent double recovery from customers – specifically, to prevent recovery of some expenses in both the transmission and distribution functions. But that type of regulatory asset cannot be established until: (1) Staff files a FERC rule 206 action challenging FERC's functional reallocation methodology, and (2) FERC rules in favor of Staff and reallocates to transmission

rates costs currently allocated to the distribution function. There can be no “double recovery” from customers until FERC actually changes its transmission/distribution allocation methodology and those new transmission rates are actually implemented in Delaware. If and only if FERC changes its allocation methodology could the creation of a regulatory liability be considered, and then as part of a docket that would be opened by the Delaware Commission in connection with Delmarva’s annual request to implement annually-established FERC transmission rates.

CONCLUSION

For all the foregoing reasons and for the reasons set forth in the Motion, Delmarva’s Motion should be granted and Staff Witness Blank’s testimony identified on page 1 thereof and the Revised Prefiled Testimony of Larry Blank filed June 8, 2018 should be stricken.

Respectfully submitted,

/s/ R. Judson Scaggs, Jr.

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